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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 439

JAMES TESTA,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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July 24th, 1970

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions	2
Constitutional Amendment	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	7
Appendix—Opinion and Judgment of the United States Court of Appeals	8

Citations

Miranda v. State of Arizona, 384 U.S. 436 (1966)	4
United States v. Lamia, U.S.C.A. 2d Cir. June 25, 1970	5

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The Petitioner, James Testa, prays that a Writ of Certiorari issue to review the judgment and opinion entered on June 25, 1970, by the United States Court of Appeals for the Second Circuit in the proceeding entitled United States of America, Appellee, v. Anthony Cusumano, Michael John McCarthy, Eugene Arthur Riggio, Anthony Suppa, and James Testa, Defendants-Appellants.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on June 25, 1970. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Question Presented

Whether it is proper for the Circuit Court of Appeals in reviewing a determination of the District Court, to condone the admission into evidence of statements made by the Petitioner who was not adequately advised of his right to have an attorney present at the time and place of questioning.

Statutory Provisions

Title 18, United States Code, Section 659, provides in part:

> . . . Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or . . . Whoever embezzles, steals or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express or other property; . . .

Title 18, United States Code, Section 2, provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Constitutional Amendment

Amendment V. Grand Jury Indictment For Capital Crimes

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, * * *

Statement of the Case

The facts which underlie the question herein presented relate to the introduction of statements allegedly made by the Petitioner in response to questions asked at the scene of the arrest by Agent Beech of the Federal Bureau of Investigation. It was the testimony of Agent Marvin Pennington that prior to any questioning, the Petitioner was warned of his Constitutional rights as follows:

"Q. Would you explain what Agent Beech said to Mr. Testa, please. A. At approximately 10:45 he advised him of his rights, the right to remain silent, the right to counsel, the right to have an attorney appointed for him if he couldn't afford an attorney and anything he said could be used against him in a Court of law." (R 237)

Under cross-examination, Appellant's counsel elicited the following testimony:

> "Q. Just tell us what you said? A. I informed him of his rights to have an attorney and if he didn't have one the Court would appoint one.
>
> The Court: You did not tell him in so many words that he could have an attorney there during the questioning?
>
> The Witness: I just informed him he had a right to an attorney and if he didn't have one the Court would appoint one, that is as far as it went.
>
> Mr. La Rossa: May I finish?
>
> The Court: Yes.
>
> Q. Sir, you didn't tell him that you would get an attorney for the interview right there, if he couldn't afford one, did you? A. No."

Further

> "Q. If he couldn't afford one, then what, sir? Then you would get one when you bring him to Court and arraign him, then you would get the Court to appoint a lawyer? A. That is when they normally appoint them, yes." (R 245)

The District Court held that the above warnings sufficed under *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and the Circuit Court of Appeals affirmed that decision.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals on the issue of the sufficiency of the warnings given to Petitioner does not properly reflect the intent of the United States Supreme Court's decision in *Miranda* v. *Arizona*.

In *Miranda* v. *Arizona*, 384 U.S. 466 (1966). this Court recognized that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today". The Court held in *Miranda* that it was absolutely necessary that a defendant in a criminal case be properly advised of his right to consult with an attorney prior to any interrogation, and further, the right to have an attorney present during any and all questioning. As the Circuit Court of Appeals noted in *United States* v. *Lamia*, United States Court of Appeals, Second Circuit—slip op. No. 537 decided June 25, 1970, the *Miranda* Court "nowhere prescribed the exact words which must be used under all circumstances". There is, however, no question about the fact that a defendant must be made to understand not that he has the right to an attorney at sometime in the future, but that he has the unequivocal right to have an attorney present at that time and place. The question in the instant case, therefore, is whether the warning given to the Petitioner adequately expressed the import of that very basic right. As the Circuit Court noted the Petitioner was advised "of his rights, the right to remain silent, the right to counsel, the right to have an attorney appointed for him if he couldn't afford an attorney and anything he said could be used against him in a court of law". (Appendix page 11)

The Appeals Court concedes that the Petitioner was not specifically told that he had the right to have an attorney present during actual questioning (App. p. 12). Nevertheless in condoning the manner in which the Petitioner was warned, the Court states that "Such an inference can readily be drawn from the circumstances of the warning". This holding affirmed the Trial Court's conclusion that the advice of the right to remain silent coupled with the advice that the Petitioner could have an attorney appointed if he could not afford one, meant "that he could have an attorney present before he answered any questions". Petitioner herein respectfully submits that the lower Court's suggestion that such an inference may be drawn is diametrically opposed to this Court's decision in *Miranda* v. *Arizona*. In *Miranda* it was stated with respect to a defendant's right to consult with a lawyer and to have a lawyer with him during interrogation, that "no amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right".

The effect of the Circuit Court's decision has been to abridge what the Supreme Court had deemed necessary requisites before any custodial interrogation.

In order that this Court may remedy the Court of Appeals misapplication of these critical principles of law, it is respectfully urged that a review of the issue below is required.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted

JAMES M. LA ROSSA
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New York, New York 10006
Counsel for Petitioner

July 24th, 1970

APPENDIX

Opinion and Judgment of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 531-535—September Term, 1969.

(Argued February 13, 1970 Decided June 25, 1970.)

Docket Nos. 34092, 34290-34293

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ANTHONY CUSUMANO, MICHAEL JOHN MCCARTHY, EUGENE ARTHUR RIGGIO, ANTHONY SUPPA and JAMES TESTA,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*

FRIENDLY and FEINBERG, *Circuit Judges.*

Appeal from a conviction after a jury trial before Judd, *J.*, United States District Court for the Eastern District of New York, for violations of 18 U.S.C. §659.

Affirmed.

JILL WINE VOLNER, Attorney, Department of Justice, Washington, D. C. (Edward R. Neaher, United States Attorney for the Eastern District of New York, Robert Orn-

stein, Special Attorney, Department of Justice, and William Murphy, Attorney, Department of Justice, on the brief), *for appellee.*

MICHAEL P. DIRENZO, New York, N. Y., for *appellant Anthony Cusumano.*

EUGENE F. MASTROPIERI, Glendale, N. Y., *for appellants Michael John McCarthy and Anthony Suppa.*

GUSTAVE H. NEWMAN, Brooklyn, N. Y. (Evseroff, Newman & Sonenshine, on the brief), *for appellant Eugene A. Riggio.*

JAMES M. LAROSSA, New York, N. Y., *for appellant James Testa.*

LUMBARD, *Chief Judge:*

Anthony Cusumano, Michael John McCarthy, Eugene Arthur Riggio, Anthony Suppa and James Testa were convicted in the Eastern District after a jury trial before Judge Judd of theft and possession of goods stolen from an interstate shipment in violation of 18 U.S.C. §659. Appellants challenge the sufficiency of the warnings given to them when they were placed in custody. We find that the warnings given satisfy the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and affirm the convictions.

Sometime during the night of October 24-25, 1968, a truck belonging to Miller Motor Freight was stolen from a freight depot in Brooklyn, New York. The truck, Miller Motor Freight No. 400, had been en route from Harrisburg, Penn-

sylvania, to Honig's Parkway Stores in the Bronx, New York, and when stolen was carrying 39 RCA Whirlpool washers, 8 RCA Whirlpool dishwashers and 2 RCA Whirlpool driers. Early in the morning of October 25, 1968, the dispatcher of the freight yard noticed that a truck was missing and notified the police. Shortly thereafter several FBI agents, Pennington, Haridopolis and Beech, stopped at appellant Testa's warehouse in Brooklyn. Testa had just given consent to search his premises, when Agent Pennington saw a trailer with the number 400 on it coming out of the warehouse. Two of the agents ran to the truck and stopped it just after it had pulled out of the gate. Appellant Cusumano was driving the truck. The agents checked the back of the truck but, finding it empty, they walked toward the rear of the premises in the direction from which the truck had come. At this point, four men, appellants McCarthy, Riggio, and Suppa, as well as Gerald Seniscalchi, who was acquitted at trial, were seen emerging from the back of the warehouse. After asking their names, the agents proceeded into the area from which the men had come and discovered a cache of boxes containing Whirlpool products. The agents made a further search and then arrested all the appellants.

At a suppression hearing held on April 30 and May 1, 1969, before Judge Judd, Agents Pennington and Haridopolis, testified, largely about the search of the premises. At the trial both agents again testified regarding the search and the warnings given before the appellants made any statements. Appellants challenge the adequacy of the warnings given to them on a variety of grounds. McCarthy, Suppa and Riggio were in a group coming from the back portion of

Testa's premises and each was given the same warning by Agent Haridopolis. Agent Haridopolis testified on voir dire that

> "I said to them that they didn't have to make any statement, that any statement they did make could be used against them in a court of law. They are entitled to an attorney to be present while they make any statements and if they could not afford an attorney, the court would appoint one."

The adequacy of the warnings to these three appellants follows *a fortiori* from *United States* v. *Lamia* decided today.

The warnings given to Testa and Cusumano, which Agent Pennington testified were given by Agent Beech, vary from those given to the other appellants, but still satisfy the *Miranda* standards. At trial Pennington testified that Agent Beech advised Cusumano

> "of his rights, the right to remain silent, right to counsel, that anything he said could be used against him in a court of law and that he didn't have to answer any questions at all."

Earlier, at the suppression hearing, Agent Pennington testified that the warning to Cusumano was phrased as follows:

> "I advised Mr. Cusumano of his rights to remain silent, of his right to an attorney, the fact that any statement he made could be used in the court of law, that he had the right to legal counsel and if he didn't have counsel, it would be appointed [sic] for him . . . ."

Agent Pennington testified at trial that Testa was advised:

> "Of his rights, the right to remain silent, the right to counsel, the right to have an attorney appointed for him if he couldn't afford an attorney and anything he said could be used against him in a court of law."

Neither Cusumano or Testa was specifically told that he had the right to have an attorney present during actual questioning, yet such an inference can readily be drawn from the circumstances of the warning. As in *Lamia*, appellants were told without qualification that they have a right to an attorney. Furthermore, Testa and Cusumano, unlike Lamia, were told explicitly that they had a right to remain silent, not to say anything. It is unrealistic to expect the same degree of formality with respect to waiver in questioning "on the street" as in the stationhouse. We agree with the trial judge who found the statement was voluntarily given and in light of the surrounding circumstances that the appellants knowingly and intelligently waived their rights.

A similar warning was upheld in *Sweeney* v. *United States*, 408 F.2d 121 (9th Cir. 1969), where the defendant was advised

> "that he did not have to answer any questions; of his right to remain silent; that any statements made by him could be used against him in a court of law; that he was entitled to an attorney; that if he could not afford an attorney one would be appointed for him; and that he was entitled to use the telephone." 408 F.2d at 124.

Although the court attached importance to the added advice that defendant could use the telephone, it stated:

> "The reference to the right to counsel, following, as it did, immediately on the warning as to the right to remain silent and the risk in not doing so, would, we think be taken by most persons to refer to the contemplated interrogation, not to some other time, particularly where, as here, appellant was told that he could use the telephone." 408 F.2d at 124.

In view of our conclusion that the warnings satisfied the requirements of *Miranda*, we find it unnecessary to consider the government's claim made for the first time at the argument of this appeal that the confessions were admissible under 18 U.S.C. §3501, 82 Stat. 218 (1968).

Appellant Testa objects that the warehouse was searched before he had been adequately warned of his right not to consent. We find no merit in this argument. See *United States ex rel. Combs* v. *LaVallee*, 417 F.2d 523 (2d Cir. 1969). Testa was an officer of Gold'N'Ripe Banana, the lessee of the warehouse where the goods were found, and was standing at the entrance when the agents approached. Although the evidence is strong that Testa gave his consent to the search, the government does not rely solely on that ground as the search was incident to a lawful arrest. Just as the agents were ending their talk with Testa they saw a truck with Number 400 on it leaving the warehouse and proceeded to stop it. At this point probable cause existed to arrest the driver, Cusumano, and the three appellants who were seen coming out of the back shortly thereafter and the judge would have been justified in finding that their freedom of movement was sufficiently restrained to constitute an arrest. See *Henry* v. *United States*, 361 U.S. 98, 103 (1959); *United States* v.

Thompson, 356 F.2d 216, 223 (2 Cir. 1965). In view of Testa's consent and the arrests which followed almost immediately there can be no doubt about the propriety of the search.

Appellant Riggio relying on *Bruton v. United States*, 391 U.S. 123 (1968), argues that it was error for the trial court to deny his motion, made before trial, for a severance because of exculpatory statements given by co-defendant McCarthy which the jury must have found false. FBI Agent Roselle testified that he had questioned McCarthy shortly after the robbery and McCarthy had stated that he did not know any of the other defendants. Roselle then told of a slip of paper that was found in McCarthy's pocket, containing the name G. Riggio and the telephone numbers 497-1020 and 497-0332. When Roselle questioned Riggio later that morning Riggio told him that his phone numbers were 497-1020 and 497-0332. On cross-examination by McCarthy's counsel, Roselle testified that McCarthy had told him at the time that the name and numbers belonged to a player on a boys' basketball team of which he was coach. The trial judge emphasized to the jury that the statement was only binding on the defendant who actually made it, and that anything a defendant says that affects another defendant cannot be considered against that other defendant. We find that it was not error for the trial judge to deny a severance. The slip of paper was not hearsay, *United States v. Bennett*, 409 F.2d 888, 895 n. 6 (2 Cir. 1969). McCarthy's statement did not implicate Riggio, and the risk that the jury might take his lie as doing so falls within the *Bruton* caveat that there are many cases where the jury can and will follow the trial judge's instruction, 391 U.S. at 135.

Appellants further claim that when the case was submitted to the jury the government should have elected between the count for stealing goods and the count for possession of goods, both charged under 18 U.S.C. §659. We agree with those courts which have passed upon this question, *D'Argento* v. *United States*, 353 F.2d 327 (9th Cir. 1965), cert. denied, 384 U.S. 963 (1966); *Robinson* v. *United States*, 333 U.S. 323 (8th Cir. 1964); *Carroll* v. *United States*, 174 F.2d 412 (6th Cir. 1949), that such an election is not required.

Only Testa testified at trial. The other appellants argue that the government made impermissible comments on their failure to take the stand. They rely on one phrase in the prosecutor's summation in which he said "You remember who testified and who did not. You remember that and you have got to ask yourself why." Taken out of context this statement would seem to be an impermissible comment on the failure of certain of the defendants to testify. In the setting in which it was made, however, we do not believe that any prejudice occurred. Throughout the trial there was dispute as to how the four defendants had come to be in the back of the warehouse. The appellants claimed that they had just come through a back door, but the government contended this was not possible as no such door existed at the time. During his summation the prosecutor focused on this issue and after a prolonged discussion that takes several pages in the transcript he stated:

> "You remember that he [Agent Haridopolis] is the only person you heard testify as to how that back room looked that morning, not Testa, not Juliano, not Sampella, not Gambino, not Lillian Stone."

Shortly after this remark, in his closing phrases on this point, the prosecutor made the statement objected to. It is clear that the reference to not testifying referred only to the dispute regarding the existence of a back door to the warehouse and the jury could not have understood it to be more than that.

We have examined appellants' other claims and find them without merit. We affirm the judgment.

SUPREME COURT, U. S.

Nos. 69 and 427

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1970

JAMES TESTA, PETITIONER

v.

UNITED STATES OF AMERICA

EUGENE RICCIO, PETITIONER

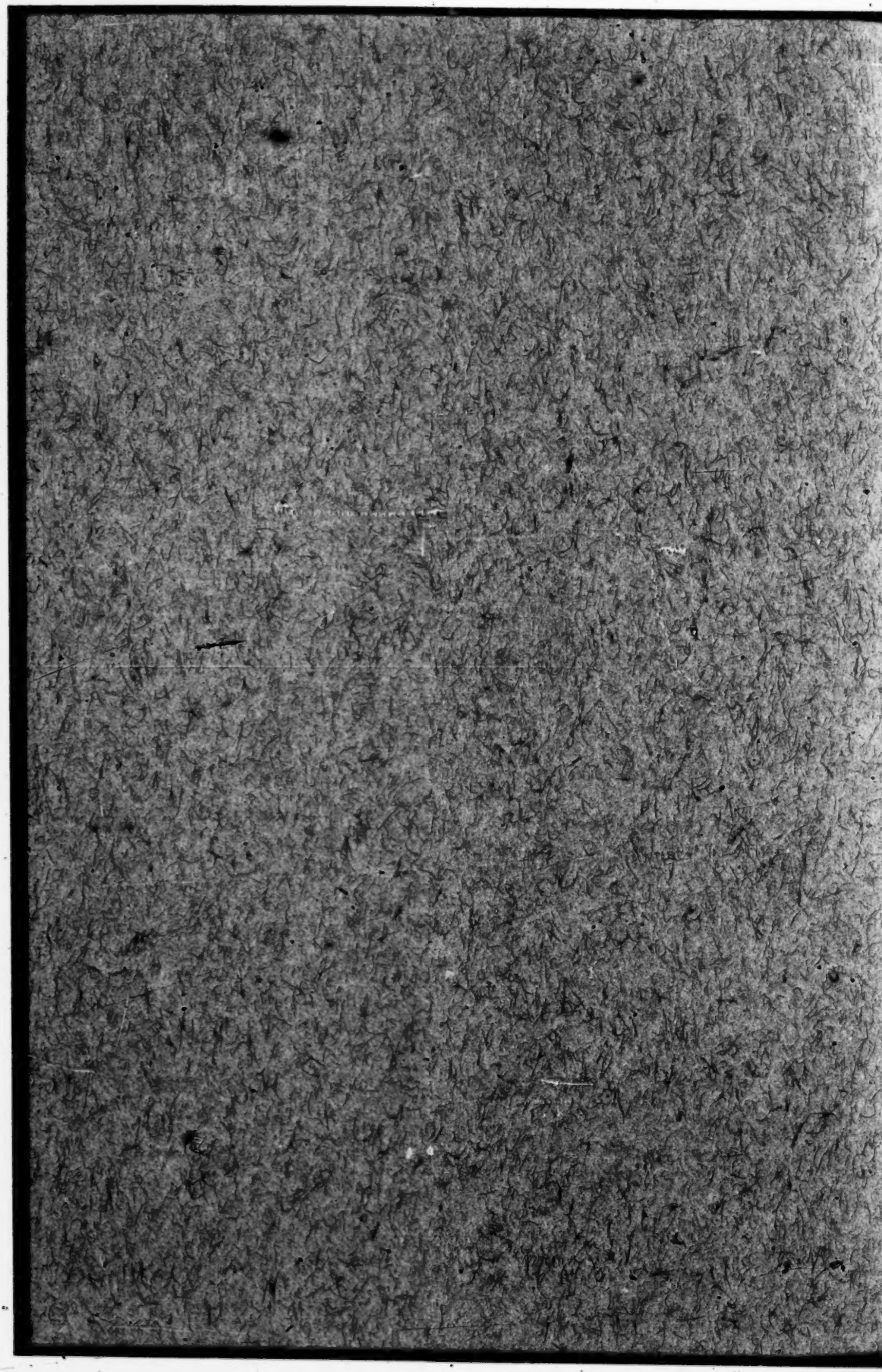
v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 439

JAMES TESTA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 447

EUGENE RIGGIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted with others of possession of

goods stolen from an interstate shipment, in violation of 18 U.S.C. 659. The court of appeals affirmed (Pet. App.).

Petitioners' contentions are carefully considered and answered in the opinion below, on which we rely. See Pet. App. 10-13 (No. 439).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

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